(R. 9). At this point, petitioners Snowden and Wrenn were introduced to the arresting officer. A conversation ensued with Robillard asking the police officer whether he usually frequented that type of bar; the police officer responded in the affirmative (R. 9). Defendant Wrenn then suggested that the police officer go to a party, to which the officer agreed, and at this juncture lewd solicitations and accompanying physical actions were made by all three petitioners (R. 9-11). This was the extent of the evidence offered by the prosecution and, after cross examination, the prosecution rested.

On cross examination the police officer stated that he had made nine arrests in the previous 15 weeks for similar solicitations (R. 15) and that none of the arrests was for soliciting persons other than police officers (R. 16). He stated that he had conversed with petitioner for 5 to 7 minutes prior to the alleged lewd statements (R. 16), and that he, the officer, was dressed in a pair of white pants, light sneakers and a polo shirt (R. 17). He admitted the scene of the incident was a bar that catered to men (R. 18, 19), that he tried to dress in order to "be in" with the patrons of the bar (R. 18) and that he had not observed any violations of the law by petitioners before he approached them (R. 20).

Petitioners Robillard and Snowden testified in their own behalf and each denied in its entirety the statement made by the police officer (R. 21-42).

Based upon this evidence, the Court found each of the defendants guilty of violating §722(8) of the Penal Law of the State of New York (R. 47).

Defendants Robillard and Snowden were each sentenced to thirty days in the workhouse, execution suspended. Defendant Wrenn was sentenced to thirty days in the workhouse, which sentence has been stayed, upon consent of the People, through August 16, 1966.

Presentation of Constitutional Questions

At the close of the People's case, petitioners moved to dismiss on the ground the People had failed to make out a prima facie case because there was "no evidence in the record that there was any breach of the peace on the part of the defendants" (R. 21). Petitioners asserted this violated their "constitutional right" and cited "*United States* v. *Thompson*, 362 U. S. 199" [*Thompson* v. *Louisville*, 326 U. S. 199] (R. 21). At the close of the entire case, petitioners moved to dismiss on the ground there was "no evidence in the record to convict these defendants" (R. 47).

At sentencing, petitioners moved to set aside the conviction on Fourteenth Amendment grounds because there was "no evidence of any intent to breach the peace or circumstances whereby a breach of the peace might occur," and because the police conduct which "caused the offense * * * constituted entrapment in violation of due process" (R. 51).

Petitioners, on appeal to the Supreme Court of the State of New York, Appellate Term, First Department, reasserted in their brief the claim of deprivation of due

process of law under the Fourteenth Amendment. Both issues: the lack of any evidence of breach of the peace and entrapment were asserted as Fourteenth Amendment due process violations.

The brief was submitted as part of petitioners' moving papers in requesting leave to appeal to the Court of Appeals of the State of New York.

Reasons for Granting Writ

No Evidence of Breach of the Peace

The requirement under §722(8) of proof of intent to cause a breach of the peace, or circumstances whereby a breach of the peace may be occassioned, has been considered and clearly interpreted by the Court of Appeals of the State of New York. *E.g., People* v. *Chesnick,* 302 N. Y. 58, 96 N. E. 2d 87 (1950). In *Chesnick,* the Court held:

> "The key phrase of the statute is 'breach of the peace' and, traditionally, that language means a violation of public order and tranquility (see No. 5 *Words and Phrases,* p. 763 *et seq.;* Black's Law Dictionary [3rd Ed], p. 246; Restatement, Torts, §116; Personal Property Law, §76). The classic definition, in modern times, of 'breach of the peace' is given by *People* v. *Most* (171 N. Y. 423, 429): 'it is a disturbance of public order by an act of violence, or by any act likely to produce violence, or which, by causing consternation and alarm, disturbs the peace and quiet of the community.' 'The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility' (*Cantwell* v. *Connecticut,* 310 U. S. 296, 308). And so, to constitute 'disorderly con-

> duct' there must be an actual or threatened 'breach of the peace', which, in turn, means a 'disturbance of the tranquility of the People of the state' (*People* v. *Perry*, 265 N. Y. 362, 365)." (302 N. Y. at 60-61, 96 N. E. at 88-89)

Nevertheless, when the Courts of New York have been involved with an alleged homosexual solicitation, no evidence of the statutory breach of the peace element is generally required to convict. *E.g., People* v. *Pleasant*, 23 Misc. 2d 367, 122 N. Y. S. 2d 141 (1953). As one New York court has noted:

> "Ordinary common sense at once suggests that the defendant in this type of case would not entertain any intention to breach the public peace and that to cause such a breach would be just about the farthest thought from his mind. Yet we go right on, as we have been doing as far back as this Court can remember, with this kind of arrest and prosecution. * * *" *People* v. *Feliciano*, 10 Misc 2d 836, 839, 173 N. Y. S.2d 123, 126 (1958)

As in the present case, there generally is no public disturbance. "[N]o solicitor desires a disturbance. This requirement [of an intent to breach the peace] has been treated in various ways by the courts. Some have ignored it; some have presumed it, thereby rendering the breach of the peace language superfluous; and others inquire whether a given solicitation threatens a disturbance." Jacobs, *Decoy Enforcement of Homosexual Laws*, 112 U. Pa. L. Rev. 259, 266 (1963).

> "The majority of homosexual solicitations are made only if the other individual appears responsive

> and are ordinarily accomplished by quiet conversation and the use of gestures and signals having significance only to other homosexuals. Such unobtrusive solicitations do not involve an element of public outrage." *The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County* 13 U. C. L. A. L. Rev. 643, 796 (1966).

Due process of law requires proof of every element of the crime charged. In *Thompson* v. *Louisville*, 362 U. S. 199, (1960), this Court, in reversing a conviction under a Kentucky disorderly conduct statute, stated:

> "There is no testimony that petitioner raised his voice, used offensive language, resisted the officers or engaged in any conduct of any kind likely in any way to adversely affect the good order and tranquility of the City of Louisville" (362 U. S. at 205-06).

It is not enough for a Court to presume that a breach of the peace might occur as a result of a spoken solicitation. "A judge's private knowledge, or even 'knowledge by notoriety' * * * not presented as part of the prosecution's case capable of being met by a defendant, is not an adequate basis, as a matter of due process, to establish an essential element of what is punished as crime." *Garner* v. *Louisiana*, 368 U. S. 157, 175 (1961) (Frankfurter, J., concurring).

Lack of proof of an essential element of the crime raises an important question of due process of law. The importance of the question is underscored by the reluctance of the courts of several states besides New York to require proof of public disturbance when homosexual solicitation activity is prosecuted under breach of the peace statutes. See, 13 U. C. L. A. L. Rev. 643, *supra*.

The Police Activity Constituted Entrapment

Although forty-three states recognize the defense of entrapment, New York is one of the two states that have rejected the defense. *E.g., People* v. *Mills,* 178 N. Y. 274, 70 N. E. 786 (1904); *Note, The Serpent Beguiled Me and I Did Eat. The Constitutional Status of the Entrapment Defense,* 74 Yale L. J. 942, 943 (1965).

When this Court has previously enunciated standards delineating the contours of this defense, it has done so in the exercise of its supervisory jurisdiction over the administration of federal criminal justice. *Sherman* v. *United States,* 356 U. S. 369 (1950); *Sorrells* v. *United States,* 287 U. S. 435 (1932); *cf., United States ex rel. Hall* v. *Illinois,* 329 F. 2d 354 (7th Cir. 1964). One important question presented by petitioners which has never before been decided by this Court is whether the due process guarantees prohibit a State from securing convictions based on evidence acquired through entrapment methods utilized by state law enforcement officials. *Cf., Banks* v. *United States,* 249 F. 2d 672 (9th Cir. 1957); *but see, Banks* v. *United States,* 258 F. 2d 318 (9th Cir.), *cert. denied,* 358 U. S. 886 (1958). The importance of deciding this issue is particularly imperative in the instant case because the defense of entrapment is unavailable in New York.

It as been sixteen years since in *Sherman* this Court attempted to enunciate workable standards defining the outer limits of the entrapment defense. Re-examination of the standards first enunciated in *Sorrells,* and then reaffirmed in *Sherman,* is long overdue. Petitioners respect-

fully submit that standards which seek to discover with whom the intent to commit the crime originated, or whether the criminal conduct was the product of the "creative activity" of law enforcement officials, have proved to be unworkable. The concurring opinions in both *Sorrells* and *Sherman* espouse an alternative, objective test which is more susceptible to uniform judicial administration. That test focuses on whether the police conduct engaged in is repugnant to civilized feelings concerning the proper use of governmental power.

Another important question presented by this petition is whether a special standard for the determination of entrapment is required when the crime charged is a sexual solicitation, and when the detection procedure consists of decoy enforcement. This Court has previously dealt with transactions concerning physical objects; in *Sorrells,* liquor was sold, and in *Sherman,* narcotics. The special entrapment problems which are created when decoys are used to apprehend sexual solicitors have never previously been dealt with by this Court. The *Sherman-Sorrells* tests, focusing on the origin of the intent and the readiness with which the defendant responds, have proved to be inadequate tools for determining what is essentially a question of appropriateness of police behavior. *Cf., Guarro* v. *United States,* 237 F. 2d 578, 581 (D. C. Cir. 1957).

> "The proper test for determining entrapment should focus on whether the proscribed act results from *any* behavior by the decoy which deviates from the conduct of an average man under the circumstances. *Any* dress, language or gestures employed by the decoy to indicate a desire for a homosexual relationship should be prohibited. Though the decoy

> should be permitted to engage in conversation with a suspected homosexual, his deliberate use of language [dress] or gestures that may be construed as a willingness to engage in a prohibited act should not be allowed. 13 U. C. L. A. L. Rev. at 796, *supra*. (Italics supplied.)

The present case presents an appropriate fact pattern for the resolution of all of these important questions. Each of the several elements of the police officer's conduct (as testified to by him): his choice of dress to "be in" with patrons of a bar that "caters to men" (R. 18, 19), his quick rapport which elicited three sexual solicitations after five to seven minutes of conversation (R. 16), and his public permissiveness to petitioner Robillard's rubbing of his thigh with his hand prior to being solicited by petitioners Snowden and Wrenn (Complaint R. 5, R. 10, 11), clearly sets forth the form and manner of the decoy methods used. Challenge to such enforcement methods is rare given the natural desire to diminish the notoriety which attaches to those who would seek to attack such practices. *Cf.*, 13 U. C. L. A. L. Rev. at 691 n. 35 *supra*.

Unless this petition is granted important questions concerning the availability of federal relief against police conduct repugnant to common feelings concerning the proper use of governmental power will remain unresolved, and abhorrent decoy enforcement methods will continue to be used without regard to the due process safeguards of the Fourteenth Amendment.

Conclusion

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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